Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BENITO ARENCIA GARCIA,

Petitioner,

v.

IVALEE HENRY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Ninth Circuit upheld the California Department of Corrections' decision to classify an inmate as a sex offender even though the inmate is currently incarcerated for a completely unrelated offense and the Department's decision was admittedly based on a single, twenty-five-year-old arrest and subsequent release. The Ninth Circuit held that this evidence satisfied the Due Process Clause.

The questions presented are:

Whether a single arrest for a sex offense can be deemed reliable evidence when determining if an inmate should be classified as a sex offender while incarcerated for an entirely unrelated offense years later.

Whether an inmate who is classified as a sex offender based solely on an isolated twenty-five-year-old arrest has received the minimum protections required by the Due Process Clause.

LIST OF PARTIES

The Petitioner is Benito Arencia Garcia.

The Respondents are: Ivalee Henry, Warden; T. Zink, Chief Deputy Warden; D. Custard, Program Administrator; B. Powell, Correctional Counselor II; J. Ossman, Correctional Counselor; J. Rodgers, Correctional and Parole Representative; B. Duball, Associate Warden; James Gomez, Director, California Department of Corrections; K. Sisto; and R. Cassilas.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Benito Arencia Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1-5 and 30-35) are unreported. The opinions of the district court (App., *infra*, 6-29 and 36-52) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 26, 2001 (App., *infra*, 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State * * * shall * * * deprive any person of life, liberty, or property without due process of law.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Administrative Code Title 15, § 3377.1(b) provides in pertinent part:

> An "R" suffix shall be affixed by a classification committee to the inmate's custody designation to alert staff of inmates who have a history of specific sex offenses.
>
> (1) The "R" suffix shall be designated for any inmate who was convicted of, or whose commitment offense includes an act equivalent to any of the following offenses:
>
> (A) Assault with intent to commit rape, sodomy, oral copulation, rape in concert with another, lascivious acts upon a child, or penetration of genitals or anus with a foreign object.
>
> (B) Rape.
>
> (C) Rape of spouse.
>
> (D) Rape or penetration of genitals or anal openings by foreign object; acting in concert by force or violence.

(E) Abduction to live in an illicit relationship.

(F) Incest.

(G) Sodomy.

(H) Sexually assaulting an animal.

(I) Lewd or lascivious acts with a child under 14.

(J) Oral copulation.

(K) Penetration of genital or anal openings by foreign object.

(2) Within six months upon reception of an inmate with a record of arrest or detention for any offenses listed in section 3377.1(b)(1), a classification committee shall determine the need for an "R" suffix to the inmate's custody designation. The committee shall consider the arrest reports and district attorney's comments related to each such arrest.

STATEMENT OF THE CASE

Petitioner filed this action in pro se against the prison officials who are responsible for erroneously labeling Petitioner as a sex offender. The action was brought under 42 U.S.C. § 1983 on the grounds that the erroneous sex offender label has been imposed and maintained in violation of Petitioner's right to due process under the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. § 1331 (general federal question

jurisdiction). The district court granted summary judgment and dismissed the action on finding that the erroneous sex offender label did not infringe a liberty interest which would entitle Petitioner to due process. The court of appeals appointed pro bono counsel to represent Petitioner on his appeal. The court of appeals affirmed the district court decision but on different grounds. The court of appeals concluded that even assuming that the imposition of the "R" suffix infringed on a liberty interest protected by the Due Process Clause, the requirements of due process were satisfied. According to the court of appeals, an inmate can be classified as a sex offender based solely on a twenty-five-year-old arrest even though the charges were dismissed without prosecution for lack of evidence.

A. Factual Background

Petitioner Benito Arencia Garcia has never been convicted of a sex offense. While Petitioner was arrested in Alameda County, California, and charged with the commission of sex-related offenses on December 9, 1976, the Alameda County Municipal Court dismissed these charges due to insufficient evidence on February 10, 1977. App., *infra*, 12, 44. The charges were dismissed after Petitioner voluntarily took and passed a polygraph test. App., *infra*, 12. In dismissing the charges for lack of evidence, the court advised Petitioner that there had been a mistake. App., *infra*, 41, 44.

By 1982, the statute of limitations had run on every sex offense Petitioner was mistakenly arrested for in 1976. *See* Cal. Penal Code §§ 264, 286, 288a and 800. Indeed, the

outside limit of the statute of limitations for these charges is six years. Therefore, by 1982, there was no possibility that the district attorney would or could re-file the charges against Petitioner. Indeed, the district attorney has pledged never to prosecute Petitioner on the 1976 charges.

Nearly a decade after the statute of limitations had run, on July 15, 1991, Petitioner was admitted into the California Department of Corrections. App., *infra*, 13. At his initial classification, the Classification Committee imposed an "R" suffix based on the 1976 arrest. App., *infra*, 13.

An "R" suffix classification is affixed "to alert staff of inmates who have a history of specific sex offenses." Cal. Code Regs. tit. 15 § 3377.1(b). When determining whether an "R" suffix is appropriate for an inmate with an arrest but no conviction for a sex offense, a classification committee *shall* examine arrest reports and district attorney comments related to each such arrest. Cal. Code Regs. tit. 15, § 3377.1(b)(2) (emphasis added). In this case, there is no conviction for a sex offense. There is no history of arrests for sex offenses. There are neither arrest reports nor district attorney comments. There is only the record of the isolated 1976 arrest and subsequent dismissal of charges for lack of evidence.

Imposition of an "R" suffix results in serious adverse consequences to inmates. Inmates labeled as sex offenders cannot be housed in a facility without perimeter gun towers. Cal. Code Regs. tit. 15 § 3375.2(a)(2). Moreover, these inmates cannot be assigned to a program or work detail outside any security perimeter unless

under constant and direct supervision. *Id.* More importantly, imposition of an "R" suffix stigmatizes these inmates and exposes them to prison violence. *Barbara K. Schwartz, Decision Making with Incarcerated Sex Offenders, in* THE SEX OFFENDER: CORRECTIONS, TREATMENT, AND LEGAL PRACTICE 8-5, 8-9, 8-10 (Barbara K. Schwartz & Henry R. Cellini, eds., 1995). Petitioner has repeatedly been confronted by other inmates and threatened because of his "R" suffix classification. App., *infra*, 25. Thus, due to Respondents' erroneous imposition of an "R" suffix – and the Ninth Circuit's refusal to correct this dangerous mistake – Petitioner belongs to an identifiable group of prisoners for whom the risk of violent attack is significantly heightened.

Furthermore, despised by the prison community, sex offenders are routinely subjected to isolation and psychological degradation. *See* H.L.P Resnick and Marvin Wolfgang, SEXUAL BEHAVIORS: SOCIAL, CLINICAL AND LEGAL ASPECTS (Little, Brown 1972). Other effects of prison victimization range from feelings of helplessness and depression, to self-destructive acts such as self-mutilation and suicide, to an increased risk of recidivism. *See* Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions, in* THE PAIN OF IMPRISONMENT 65, 69 (Johnson and Toch eds., 1982).

Petitioner has persistently attempted to have the "R"suffix classification removed through administrative appeals, a state habeas corpus petition, and this § 1983 action. App., *infra*, 8, 13. Despite these efforts, Petitioner remains subject to the "R" suffix classification based solely on the 1976 arrest even though the charges were dismissed for lack of evidence.

B. Proceedings Below

Petitioner filed a pro se complaint for injunctive relief under 42 U.S.C. § 1983 to correct his erroneous "R" suffix classification. Petitioner alleged that he has a liberty interest in being free of this improper classification. In addition to housing and work restrictions, such a designation – and Respondents' continued refusal to correct this mistaken assignment – poses a serious threat to Petitioner's physical safety and psychological well-being while he remains incarcerated. Petitioner alleged that the classification was imposed in violation of the Due Process Clause.

Respondents filed a motion to dismiss or, in the alternative, a motion for summary judgment. The district court granted the motion on finding that Petitioner did not have a liberty interest in freedom from an "R" suffix designation. App., *infra*, 24-28. Petitioner appealed to the Ninth Circuit which then appointed pro bono counsel. On June 26, 2001, the Ninth Circuit affirmed the district court, but on different grounds. App., *infra*, 1-5. The court observed that the prison regulations permit prison officials to consider arrest histories in determining whether to classify an inmate as a sex offender. Based on this regulation, the court held that the evidence in this case, Petitioner's single arrest for a sex offense more than two decades ago, was not so insufficient as to violate the Due Process Clause and held that Respondents did not act arbitrarily in affixing and retaining the "R" suffix. App., *infra*, 4.

REASONS FOR GRANTING THE PETITION

This case presents a recurring and important question under the Due Process Clause. Specifically, all across this country, prisons have adopted classification procedures for identifying sex offenders and singling them out for special treatment. Classification of an inmate as a sex offender imposes significant security restrictions on the inmate and exposes the inmate to both serious psychological consequences and physical danger. Yet, despite the frequency and seriousness of these determinations, this Court has not addressed the appropriate evidentiary standard required by the Due Process Clause to support a sex offender classification. This case presents an opportunity for the Court to provide guidance to the lower courts by establishing the appropriate evidentiary standard. Moreover, the decision below erroneously applied a minimal evidentiary standard in violation of the requirements of due process.

I. THIS COURT SHOULD RESOLVE THE UNCERTAINTY AMONG THE CIRCUITS REGARDING THE STANDARDS AND BURDENS OF PROOF THAT GOVERN SEX OFFENDER CLASSIFICATION PROCEEDINGS

"Sex offender" is a distinctly odious label in contemporary America. As a result, the circuits have uniformly recognized the unique stigma associated with such a classification in due process claims by inmates seeking to avoid being branded "sex offenders" in the prison environment. *See, e.g., Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (stating that it could "hardly conceive of a state's action bearing more 'stigmatizing consequences'

than the labeling of a prison inmate as a sex offender"); *Chambers v. Colorado Dept. of Corrections*, 205 F.3d 1237, 1242-1243 (10th Cir. 2000) (recognizing an inmate's liberty interest in "not being labeled a sex offender"); *Kirby v. Siegelman*, 195 F.3d 1285, 1291-1292 (11th Cir. 1999) (recognizing an inmate's liberty interest in "not being branded a sex offender," an interest similar to that in not being branded "mentally ill"). However, while recognizing that a liberty interest is at stake, there is no agreement among the circuits as to what due process requires under these circumstances. It is time for this Court to articulate minimum standards.

In an earlier decision, the Ninth Circuit held that "an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his case." *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997). However, the court left open the question of what standards due process would require at that hearing. The court stated:

> We do not here attempt to define the entity which should conduct the hearing, nor do we discuss the appropriate burden of proof or identify the party who should bear it. The Due Process Clause, at a minimum, requires advance notice and an opportunity to be heard. The play in the joints of the Due Process Clause . . . allows states to flesh out the details defining the limits of such a hearing. We merely hold today that an inmate whom the prison intends to classify as a sex offender is entitled to an advance statement of the reasons for that classification and an opportunity to call witnesses

> and present evidence to challenge the imposition of that classification.

Id. at 831, n. 14.

The question left open in *Neal* – what specific burdens are appropriate in a hearing to determine whether an inmate should be classified as a sex offender – needs to be resolved. The inadequacy of procedural protections has been criticized by commentators. *See Comment, Criminal Procedure – Ninth Circuit Provides Inadequate Due Process Protections For Accused Sex Offenders,* 111 HARV. L. REV. 2438 (1998). Indeed, the decision below demonstrates the need for this Court to articulate minimum standards.

Fortunately, this Court has already established the framework for the required analysis. As this Court has explained, the Due Process Clause encompasses a guarantee of fair procedure. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). In procedural due process claims, the deprivation by state action of a constitutionally protected liberty interest "is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of* law." *Id.* Thus, to determine whether a constitutional violation has occurred, the court must ask what process the state provided, and whether it was constitutionally adequate. *Id.*

Whether a proceeding is constitutionally adequate depends in part on the standards and burdens of proof that are to be followed. As this Court has explained, "The function of a standard of proof, as that concept is embodied in the Due Process Clause . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual

conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423 (1979). The standard allocates the risk between the parties and reflects the relative importance attached to the outcome. *Id.*

Generally, the law has produced three standards across a continuum. *Addington*, 441 U.S. at 423. First, in the typical civil case involving a monetary dispute between private parties, the plaintiff's burden is a mere preponderance. As the *Addington* Court explained, society has a minimal concern with the result in these cases and so the litigants "share the risk of error in roughly equal fashion." *Id.* At the other end of the spectrum are criminal cases. In those cases, "the interests of the defendant are of such magnitude that historically . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.*

In the middle falls the clear and convincing evidence standard. *Id.* at 424. This intermediate standard is applied in cases where the interest at stake is greater than simple monetary loss. *Id.* For example, it is often employed in civil cases for fraud or other quasi-criminal misconduct. *Id.* In those cases, because greater interests are at stake than in the typical monetary dispute, defendants are afforded greater protection against having their reputations tarnished erroneously. *Id.*

After explaining the spectrum of standards available, the *Addington* Court determined the standard that due process required in a civil commitment proceeding. The state of Texas committed people under a preponderance of the evidence standard. The plaintiff challenged that

standard and argued that due process required adoption of the criminal standard, "beyond a reasonable doubt." While civil commitment proceedings are distinguishable from the "R" suffix classification at issue in this case, the Court's framework for analysis is applicable.

The *Addington* Court first evaluated the individual's interest in a correct decision. The Court recognized that involuntary commitment constituted a significant deprivation of liberty. *Id.* at 425. "[I]t is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual," the Court noted. "Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." *Id.* at 425-426.

After determining the importance of the individual's interest, the Court evaluated the state's interest. The Court recognized that the state had an interest in providing care to its citizens who are unable to care for themselves and protecting the public from those suffering mental illness who might be dangerous. *Id.* at 426.

On balance, the Court concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427. But the Court rejected the reasonable-doubt standard. Given the uncertainties of psychiatric medicine, that standard may impose a burden that the state cannot

meet and thereby erect an unreasonable barrier to needed medical treatment. *Id.* at 427-431. Therefore, the Court settled on the clear and convincing evidence standard. *Id.* at 431-433.

In the present case, neither the district court nor the court of appeals evaluated the relative interests of the parties or determined the appropriate standards and burdens of proof in the context of sex offender classification proceedings. Due process requires this careful weighing of the interests. Just as the petitioner in *Addington* had a significant liberty interest in not being erroneously labeled as mentally ill, Petitioner in this case has a significant liberty interest in not being erroneously labeled a sex offender.

And, as in *Addington*, in addition to the stigma of being labeled a sex offender, the classification has a very significant impact on the individual. Specifically, beyond housing and work restrictions, labeling a prison inmate a sex offender is equivalent to labeling him a target for violence in an already volatile environment. *Barbara K. Schwartz, Decision Making with Incarcerated Sex Offenders, in* THE SEX OFFENDER: CORRECTIONS, TREATMENT, AND LEGAL PRACTICE 8-5, 8-9, 8-10 (Barbara K. Schwartz & Henry R. Cellini, eds., 1995). It may also cause devastating psychological injuries. Thus, the consequences of labeling an inmate a sex offender impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" and therefore require due process protection. *See Sandin v. Conner*, 515 U.S. 472, 484 (1993). The quantum of evidence required to impose such a label on Petitioner should take into consideration his weighty

interest in being free from the hardship imposed by the classification.

On the other hand, Respondents have a significant interest in properly assigning "R" suffixes. According to the Department of Corrections Operations Manual, "R" suffixes are applied to inmates "to limit their opportunity to escape, or reoffend while in custody." Thus, as in *Addington,* Respondents have significant public safety and security interests.

Given the significance of the interests on both sides of the equation, the determination of the constitutionally required standards will require careful consideration. In addition to the competing interests of the individual and the government, it is necessary to evaluate the probable value and efficacy of additional procedural protections and the burdens those protections would impose on government interests. *See Mathews v. Eldridge,* 424 U.S. 319 (1976).

This case presents the opportunity for this Court to engage in the required due process analysis. This Court should establish minimum standards to protect people, like Petitioner, from being wrongly labeled as sex offenders. And this Court should ensure that prisons are able to achieve the security they need without undue administrative burdens. In view of the weight of the interests at issue both for the individual inmates and for the states, this Court should resolve this important question of federal law.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS BECAUSE THE EVIDENCE SUPPORTING THE SEX OFFENDER CLASSIFICATION IN THIS CASE FAILS TO SATISFY EVEN THE MOST DEFERENTIAL "SOME EVIDENCE" STANDARD

Under the Due Process Clause, the state may not deprive a person of a protected liberty interest without first affording the person procedural due process. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that the Due Process Clause requires that a deprivation of life, liberty, or property be "preceded by notice and opportunity for hearing appropriate to the nature of the case.")

Post-deprivation process is sufficient in circumstances where it is not practicable to provide pre-deprivation process – for example, in the case of random and unauthorized deprivations of liberty. *See Hudson v. Palmer*, 468 U.S. 517, 533-534 (1984); *Parratt v. Taylor*, 451 U.S. 527, 534-544 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1983). Deprivations effected pursuant to policy or established procedure, however, are neither unforeseeable nor random and unauthorized, and a post-deprivation remedy hence will not suffice. *See Zinermon v. Burch*, 494 U.S. 113, 136-139 (1990); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

Petitioner's misclassification as a sex offender, coupled with the security restrictions and physical and psychological consequences that flow from it, was effected pursuant to policy or established procedure. Thus, the deprivation at issue here implicates a liberty interest subject to the protections of due process. *See Neal v.*

Shimoda, 131 F.3d 818, 827 (9th Cir. 1997). As the Ninth Circuit previously recognized, at a minimum, the process for labeling an inmate a sex offender requires advance notice and an opportunity to be heard, to call witnesses, and to present documentary evidence. *Neal*, 131 F.3d at 831. The question left open in *Neal* – the standards and burdens of proof that apply at such a hearing – was in effect answered in this case when the court concluded that evidence of a twenty-five-year-old arrest was sufficient. This ruling is erroneous because the evidence fails to satisfy even the most deferential "some evidence" standard.

Respondents have argued that due process in the context of sex offender classification proceedings may be satisfied by meeting the "some evidence" standard adopted by this Court in *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). In *Hill*, an inmate lost good time credits after he was disciplined for being involved in an assault. The Court recognized the inmate's interest in serving a reduced sentence. *Id.* at 454. It then balanced that interest against the prison's interest in assuring the safety of inmates, avoiding administrative burdens that might be manipulated, and preserving the disciplinary process. *Id.* at 454-455. And, as the Court observed, prison disciplinary proceedings take place in a highly charged atmosphere where swift action is often necessary. *Id.* at 456.

The interests at stake in *Hill* must be contrasted to the interests at stake in this case. In *Hill*, the inmate had an interest in reducing his time in prison. Here, Petitioner's interest is in his bodily integrity and security. The individual interest in this case is far more significant than in

Hill. Moreover, in *Hill* the prison had an interest in maintaining its disciplinary system in a highly-charged atmosphere following an outbreak of violence. Here, the prison's interest is in preventing the possibility of future escapes or offenses. The prison's need to maintain order in *Hill* is far more urgent than the prison's desire to prevent possible future misconduct in this case. In short, while the balance of the interests in *Hill* justified the application of the extremely deferential "some evidence" standard, the interests at stake in this case are distinguishable.

Nevertheless, even if this Court adopts the "some evidence" standard for sex offender classification proceedings, the evidence at issue here cannot satisfy even this deferential level of review. In applying the standard of review to a prison's disciplinary decision, this Court held that "some evidence" is satisfied by "any evidence in the record that could support the [board's] conclusion." *Id.* at 455-456 (1985). The "some evidence" standard is "minimally stringent." *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). However, it has also been held that "[n]onetheless, there must be some indicia of reliability of the information that forms the basis for prison disciplinary actions." *Id. See Mendoza v. Miller*, 779 F.2d 1287, 1295 (7th Cir. 1985); *Kyle v. Hanberry*, 677 F.2d 1386, 1390-1391 (11th Cir. 1982).

As this Court has observed, an arrest has little to no probative value when determining whether an individual has engaged in any misconduct or committed the crime for which he was arrested. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957). As this Court explained:

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.

Id. at 241.

Under *Schware,* the arrest and release of Petitioner in 1976 is not reliable evidence to support the "R" suffix classification. An arrest coupled with other evidence – such as an arrest report, district attorney comments, or a lengthy history of arrests – might satisfy the some evidence standard. But there is no corroborating evidence in this case. While Petitioner was admittedly arrested for a sex offense twenty-five years ago, he was released without prosecution with an apology by the court for the mistaken detention. In short, Petitioner's arrest is evidence of just that – an arrest. It is not reliable evidence of the appropriateness of an "R" suffix.

Consistent with *Schware,* in an earlier case, the Ninth Circuit recognized that an isolated prior accusation would not be sufficient evidence to support a sex offender classification. *Neal v. Shimoda,* 131 F.3d 818, 827 (9th Cir. 1997). In *Neal,* the Ninth Circuit held that when a prisoner has never been convicted of a sex offense, the fact that he has been indicted for such an offense "does not satisfy due process" when determining whether the inmate should be classified as a sex offender when subsequently incarcerated for an unrelated offense. *See Neal,*

131 F.3d at 830 (9th Cir. 1997). If an indictment cannot satisfy due process, certainly a bare arrest cannot provide minimum due process protections. Yet, in this case, the Ninth Circuit, while assuming that *Neal* controlled the outcome of this case, ignored this critical holding.

Moreover, the regulations at issue here expressly state that an "R" suffix is attached to an inmate's custody designation in order to alert staff of inmates who have a *history of specific sex offenses* (emphasis added). Cal. Code Regs. tit. 15, § 3377.1(b). But a single, twenty-five-year-old arrest, which was dismissed for insufficient evidence and led to an apology by the court, is not evidence of a history of specific sex offenses. The regulation is clearly designed to protect prison personnel and fellow inmates from those with a predilection for committing sex offenses. But the Ninth Circuit's decision in this case simply goes too far. Under the court of appeal's reasoning, a single, meritless arrest may be used to establish that an inmate is a danger to others inside and outside prison. But attaching a sex offender label to potentially thousands of undeserving inmates does not serve the regulation's goals. Instead, allowing the mass application of the "R" suffix puts these inmates at risk of physical attack while masking the identities of those inmates who truly are a danger to personnel and prisoners alike.

In the decision below, the Ninth Circuit observed that Petitioner "has received plenty of due process" in this case. App., *infra*, 3. As the court of appeals noted, Petitioner has challenged the imposition of the "R" suffix at numerous hearings and other classification proceedings. *Id.* Indeed, he has appeared and testified at several of those hearings and has presented documentary evidence

at two of his hearings. But a multiplicity of hearings is meaningless if the same insufficient evidence is always the basis for the Respondents' adverse ruling. The requirements of due process are not satisfied by the empty formality of holding a hearing or even several hearings. Due process also requires the decisions to be based on evidence in the record. As this Court has explained, "In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violated due process if the decision is not supported by any evidence." *Hill*, 472 U.S. at 455.

In this case, the decision to classify Petitioner as a sex offender is not supported by any reliable evidence. There is no history of sex offenses – either arrests or convictions. There are no arrest reports and no district attorney comments. The only evidence supporting the sex offender classification is the 1976 arrest where the charges were dismissed for lack of evidence with an apology from the court.

The absence of any reliable evidence in this case contrasts sharply to cases where the "some evidence" standard has been met. A helpful example can be found in this Court's decision in *Superintendent v. Hill*, 472 U.S. 445 (1985). In *Hill*, the plaintiff challenged the revocation of his "good time" credits for allegedly assaulting another inmate. The disciplinary committee revoked the plaintiff's credits based on the testimony of a prison guard and on copies of his written report. The guard testified that he had heard a commotion in an enclosed area and went to investigate. When he entered the area he saw four inmates, one of whom appeared to have been

very recently assaulted, and three others who were running away. Although the Court characterized the evidence as "meager," it held that the guard's testimony and written report satisfied the "some evidence" standard. *Id.* at 457.

The meager evidence available in *Hill* seems substantial when compared to the evidence in this case. In *Hill*, prison administrators had live testimony from the guard who conducted the investigation as well as his written report. That evidence is analogous to a police report and district attorney comments which may be considered in assessing an "R" suffix classification. Cal. Code Regs. tit. 15, § 3377.1(b)(2). In contrast, Respondents' decisions to classify Petitioner as a sex offender are not supported by either police reports or district attorney comments or any other reliable evidence, tangible or intangible, direct or circumstantial, that suggests that he was guilty of the 1976 charges.

In short, in this case, Petitioner has been classified as a sex offender even though no reliable evidence supports the classification. The consequences of the classification include housing and work restrictions, psychological injuries, and exposure to physical violence. Precisely because the classification and its consequences are so severe, prisoners who have not been afforded a full trial on sex offense charges need at least minimal procedural protections. Yet the court of appeals concluded that the requirements of due process were satisfied based solely on the 1976 arrest. This Court should grant this petition to provide guidance to the lower courts as to the due process protections which should be applied in sex

offender classification proceedings and to correct the Ninth Circuit's error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO ARENCIA GARCIA, Plaintiff-Appellant, v. IVALLE HENRY, Warden; T. ZINK, Chief Deputy Warden; D. CUSTARD, Program Administrator; B. POWELL, Correctional Counselor II; J. RODGERS, Correctional and Parole Representative; B. DUBALL, Associate Warden; JAMES GOMEZ, Director; CALIFORNIA DEPARTMENT OF CORRECTIONS; K. SISTO; R. CASILLAS, Defendants-Appellees.	No. 99-15277 D.C. No. CV-94-00699-LKK/GGH MEMORANDUM* (Filed Jun. 26, 2001)

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted June 12, 2001
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: GOODWIN, GRABER, and MCKEOWN, Circuit Judges.

Plaintiff, Benito Arencia Garcia, sued Defendants, who are prison officials, under 42 U.S.C. § 1983. He sought damages and an injunction directing Defendants to remove the "R" suffix from his custody designation.[1] The district court granted summary judgment for Defendants, and Plaintiff appeals. On de novo review, *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc), we affirm.

A. Due Process

Plaintiff's primary argument is that Defendants' imposition of the "R" suffix deprived him of a protected

---

[1] Section 3377.1(b) of 15 California Administrative Code provides in part:

> An "R" suffix shall be affixed by a classification committee to the inmate's custody designation to alert staff of inmates who have a history of specific sex offenses.
>
> (1) The "R" suffix shall be designated for any inmate who was convicted of, or whose commitment offense includes an act equivalent to any of the following offenses: [listing offenses].
>
> (2) Within six months upon reception of an inmate with a record of arrest or detention for any offenses listed in section 3377.1(b)(1), a classification committee shall determine the need for an "R" suffix to the inmate's custody designation. The committee shall consider the arrest reports and district attorney's comments related to each such arrest.

liberty interest and, accordingly, implicated the Due Process Clause. He relies on *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997).

Assuming – without deciding – that *Neal* controls and that the imposition of the "R" suffix created a liberty interest, the district court still did not err in granting summary judgment for Defendants. As the district court noted, "plaintiff has received plenty of due process" in this case. In *Neal*, this court held that, when the Due Process Clause is implicated by the imposition of a "sex-offender" designation, the inmate to whom the designation is applied "is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense." *Id.* at 831. Here, Plaintiff has challenged the imposition of the "R" suffix at numerous hearings and other classification proceedings. He has appeared and testified at several of those hearings and has presented documentary evidence at two of his hearings, at least. And although there is nothing in the record to indicate that Plaintiff called witnesses at any of his many hearings, he does not allege that he wanted to call witnesses or that he ever was denied the opportunity to do so.

Plaintiff acknowledges that he has had many opportunities to address the "R" suffix designation. He contends, however, that the evidence presented at his hearings was insufficient to meet the government's burden of proof for imposing the "R" suffix and, accordingly, that the hearings did not satisfy the requirements of the Due Process Clause. Plaintiff notes that *Neal* left open the question of the appropriate burden of proof at a "sex-offender-designation" hearing, *id.* at 831 n.14, and argues

that the evidence in this case cannot satisfy even the most lenient standard possible, because the evidence demonstrates only that Plaintiff had been *arrested and charged* with sex crimes in the past, but not that he had been *convicted*.[2] *But see Superintendent v. Hill*, 472 U.S. 445, 455 (1985) (holding that "some evidence" is required).

The difficulty with that argument is that Defendants never found that Plaintiff had been convicted of any sex crimes. Rather, they found only that Plaintiff had been *arrested and charged* with sex crimes, which Plaintiff admits (and has always admitted). His arrest record was part of the record in his initial classification hearing and at his subsequent hearings. The relevant rule requires prison officials to consider imposing the "R" suffix on inmates, like Plaintiff, who have been arrested for sex crimes, even if they have not been tried or convicted. Defendants followed the rule in this case.

The evidence plainly is sufficient to establish the fact of Plaintiff's arrest for sex crimes under any possible burden of proof. On this record, Plaintiff's argument that the evidence was so insufficient as to violate the Due Process Clause necessarily fails, and we cannot say that Defendants acted arbitrarily in affixing and retaining the "R" suffix.[3]

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[2] Plaintiff concedes that the charged crimes are on the list of crimes covered by the classification rule at issue.

[3] Plaintiff does not argue, and has never argued, that there is anything constitutionally deficient about 15 California Administrative Code § 3377.1 as a general matter, or that there is any constitutional problem inherent in applying the "R" suffix (and its attendant, moderate restrictions) solely on the ground of an arrest for a sex crime.

B. Eighth Amendment

Plaintiff also argues that, by refusing to remove the "R" suffix from his custody designation, Defendants placed him in a position of danger, "thus violating his substantive due process rights." Although Plaintiff presents this claim as a "substantive due process" claim, it is properly labeled a claim of cruel and unusual punishment under the Eighth Amendment. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (holding that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment"); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (to the same effect). In any event, Plaintiff did not present this claim to the district court, either as a "substantive due process" claim or as a claim under the Eighth Amendment. The claim is therefore unpreserved, and we will not address it for the first time on appeal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENITO ARENCIA GARCIA,

Plaintiff,

vs.

IVALEE HENRY, et al.,

Defendants.

No. CIV S-94-0699 LKK GGH P

ORDER

(FILED December 21, 1998)

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On September 30, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed September 30, 1998, are adopted in full;

2. Defendants' February 3, 1998 summary judgment motion is granted; and

3. This action is dismissed.

DATED: ~~October~~ 12/15, 1998.

/s/ Lawrence K. Karlton
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENITO ARENCIA GARCIA,

Plaintiff,

vs.

IVALEE HENRY, et al.,

Defendants.

_____/

No. CIV S-94-0699 LKK GGH P

FINDINGS & RECOMMENDATIONS

(Filed Sep. 30, 1998)

I. Introduction

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On October 2, 1996, the Ninth Circuit remanded this case as to plaintiff's claim that defendants' imposition of an R-suffix classification violated due process. In particular, the Ninth Circuit directed this court to consider whether imposition of the R-suffix constituted a liberty interest pursuant to *Sandin v. Connor*, 515 U.S. 472, 115 S. Ct. 2293 (1995).

This action is now proceeding on plaintiff's July 15, 1997, amended complaint. Plaintiff's only remaining claim is that he was denied due process with imposition of the R-suffix.[1] On February 3, 1998, defendants filed a summary judgment motion. On February 26, 1998, plaintiff filed a request for an extension of time to file his

[1] Plaintiff's claim regarding denial of conduct credits contained in the amended complaint were ordered stricken on February 10, 1998.

"oppositions or any other motions to defendants' dismissal/summary judgment . . . " On April 1, 1998, the court granted plaintiff an extension of time to file an opposition to defendants' motion. On April 28, 1998, plaintiff filed a second request for extension of time to file his opposition to defendants' motion. On May 12, 1998, the court ordered plaintiff's opposition due within thirty days.

On June 10, 1998, plaintiff filed a third request for extension of time to file his opposition. On June 22, 1998, the court granted this request and ordered plaintiff's opposition due within thirty days. On July 17, 1998, plaintiff filed a forth request for extension of time to file his opposition. On July 29, 1998, the court ordered the opposition due within thirty days. On September 2, 1998, plaintiff filed his opposition and cross-motion for summary judgment.

After carefully considering the record, the court recommends that defendants' motion be granted and this action be dismissed.

II. Summary Judgment Standards Under Fed. R. Civ. P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

> Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on filed.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the

denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the

opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

On December 30, 1994, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, No. 95-15428, 1998 WL 541380 (9th Cir. August 27, 1998) (en banc); *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

III. Discussion

Plaintiff alleges that on December 9, 1976, he was arrested for violations of California Penal Code sections 261, 286 and 288a (sexual offenses). Plaintiff later underwent a polygraph examination the results of which, apparently, did not link him to the crimes. On February 10, 1977, the charges were dismissed.

In 1991, regarding an unrelated charge, plaintiff was incarcerated at the California Institution for Men (CIM).

At his initial classification, the Classification Committee acted to "impose" an "R" suffix onto plaintiff's identification number. The R suffix is added to the numbers of inmates who have committed sexual offenses or who have had "significant arrests" for sexual offenses. Plaintiff's administrative appeals requesting removal of the R suffix were denied, but plaintiff also alleges that recently, in 1998, his requests to have the "R" suffix removed have been granted at lower administrative levels.

A. Res Judicata/Collateral Estoppel

Defendants state that plaintiff has previously litigated the issue of his R-suffix in the California Court of Appeal, *In re Benito Garcia on Habeas Corpus*, Case No a062405. A copy of plaintiff's state habeas petition is attached as defendants' exhibit H. In this petition, plaintiff challenged imposition of the R suffix. Although he did not specifically allege that his due process rights were violated, attached as an exhibit is briefing regarding a case in the Fourth Circuit which states that incorrect information in an inmate's file violates due process. Attached as an exhibit to the state petition is a copy of a habeas petition that plaintiff filed in the Superior Court. At page 7 of the briefing in support of this petition, plaintiff alleges a due process violation.

Attached as defendants' exhibit I is a copy of a letter to the Clerk of the California Court of Appeal from a Deputy Attorney General regarding plaintiff's habeas petition. The letter begins, "The following is submitted in response to the Court's request for informal opposition to the above-entitled petition." The letter goes on to discuss

the Attorney General's position regarding plaintiff's claim. Attached as defendant's exhibit J is plaintiff's reply to the Attorney General's letter. Attached as exhibit K is a copy of an order by the California Court of Appeal denying plaintiff's habeas. This order simply states, "The petition for writ of habeas corpus is denied."

1. Preclusive Effect of State Proceedings in a § 1983 Action

Defendants contend[ ] that plaintiff has presented the same claim in state court as is presented in the instant § 1983 action. Because plaintiff has sought and obtained state court review of his claim in the prior state habeas proceeding, defendants argue that plaintiff is barred from presenting his § 1983 claim in this court by the doctrine of res judicata. Defendants argue that the judgment in the prior state habeas proceeding should be given preclusive effect to bar plaintiff from presenting his claim in this forum.

Under the doctrine of res judicata, " '[a] final judgment on the merits bars a subsequent action between the same parties or their privies over the same cause of action.' " *The Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992), quoting *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985). The doctrine of res judicata consists of two concepts, issue preclusion, or collateral estoppel, and claim preclusion, or res judicata. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n. 1 (1984). "Issue preclusion [collateral estoppel] refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and

decided." *Id.* "Claim preclusion [res judicata] refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Id.* "Claim preclusion [res judicata] bars the assertion of any theory of recovery that could have been asserted in the first action." *Fund for Animals*, at 1398, citing *Robi v. Five Platters, Inc*, 838 F.2d 318, 322 (9th Cir. 1988).

When a state court judgment is the source of the asserted preclusion, 28 U.S.C. § 1738 provides that a federal court must "give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so[.]" *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 415 (1980).

a. Issue Preclusion

In *Allen*, the Court considered whether the doctrine of issue preclusion (collateral estoppel) applied to preclude a § 1983 claim in federal court following a state court criminal proceeding in which plaintiff had contested the seizure of evidence as unconstitutional under the Fourth Amendment.[2] Plaintiff in *Allen* had been

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[2] The claim presented in the federal § 1983 action was for damages as a result of plaintiff's claim of illegal search and seizure under the Fourth Amendment. State courts had upheld the entry of the house as reasonable but held that seizure of evidence not in plain view was illegal. The precise issue on appeal was "the broad question of the applicability of collateral estoppel to broad questions of the applicability of collateral estoppel to § 1983 suits brought by plaintiffs in McCurry's circumstances." *Allen*, at 93, n. 2. The Court held that collateral

afforded a pretrial suppression hearing on a suppression motion which the state court denied in part. Plaintiff was convicted after a jury trial, and the conviction was affirmed on appeal. In the subsequent federal proceedings pursuant to § 1983, the district court had granted summary judgment for the defendants, applying the doctrine of collateral estoppel to find that plaintiff was precluded from relitigating the search and seizure issue. The appellate court had reversed, holding that the doctrine of collateral estoppel did not apply in a § 1983 case. The U.S. Supreme Court reversed, holding that the doctrine of issue preclusion could apply in § 1983 cases. In doing so, the Court state[d]:

> But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.

Allen, at 95 (citations omitted).[3]

The *Allen* court recognized that the mere creation of a federal cause of action does not by itself do away with

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estoppel could apply in § 1983 cases, but stated "[w]e do not decide *how* the body of collateral-estoppel doctrine . . . should apply in this case." *Id.* at 105, n. 25. The Court refused to consider the specific issue of whether McCurry could proceed to trial to obtain damages for that part of the seizure declared illegal by the state courts, *Id.* at 93, n. 2.

[3] It is important to note that there was no issue presented in *Allen* of whether McCurry had a full and fair opportunity to litigate his claim in the state court. *See Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 82, n. 5.

the preclusion rules. (*Allen* at 98, n. 11), and held that the general preclusion rule of collateral estoppel was applicable in a § 1983 action. The Court did not consider whether plaintiff had a full opportunity to litigate his claims. This circuit has characterized *Allen* as a case in which "the state court had provided the federal plaintiff a full and fair opportunity to litigate his federal claims." *Takahashi v. Board of Trustees of Livingston Union School District*, 783 F.2d 848, 850 (9th Cir. 1985).

b. Claim Preclusion

In *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), the Court considered whether the doctrine of claim preclusion [res judicata] applied to preclude a federal issue that a § 1983 plaintiff could have raised but did not raise in the earlier state court proceeding. The *Migra* court applied the *Allen* reasoning to hold that the doctrine of claim preclusion could apply in a § 1983 action filed after a judgment in a state proceeding if state law would give the state judgment "claim preclusive effect." *Migra*, at 85.[4] The *Migra* case considered whether judgment in a civil case for breach of contract could have claim preclusive effect in a § 1983 action. The Supreme Court, answering in the affirmative, remanded the case to

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[4] In *Migra*, the plaintiff in the § 1983 action in federal court had not presented her federal constitutional claims in the state action for breach of contract, which had proceeded to judgment after a bench trial. The lower court judgment was affirmed on appeal, and review had been denied by the Supreme Court of Ohio. *Id.* at 78-79. The U.S. Supreme Court remanded the case to the district court to determine the claim preclusive effect of Ohio law with respect to the federal constitutional claims.

the District Court to interpret and apply Ohio preclusion law.

Prior to *Migra*, the Ninth Circuit had ruled that an earlier judgment in a state habeas proceeding may have res judicata effect in a subsequent § 1983 action if the state habeas court afforded "a full and fair opportunity for the issue to be heard and determined under federal standards." *Silverton v. Dept. of Treasury*, 644 F.2d 1341, 1345-47 (9th Cir. 1981) *cert. den.*, 454 U.S. 895 (1981). Following *Migra*, in *Piatt v. MacDougall*, 773 F.2d 1032, 1034-35 (9th Cir. 1985) (en banc), the Ninth Circuit applied Arizona law to determine the preclusive effect on a lower state court judgment (entered in a petition for writ of special action) on a § 1983 claim subsequently filed in federal court. The Ninth Circuit, citing *Migra*, stated: "[w]hether a prior state court judgment bars litigation of a § 1983 claim depends on the preclusion rules of the state, not those of the federal courts" *Piatt* at 1034. However, in finding that the Arizona doctrine of claim preclusion applied to part of Piatt's case, the court recognized that the state court judgment was a final judgment on the merits and stated that it constituted a "constitutionally adequate hearing." *Id.*, at 1035.

c. Full and Fair hearing

A basic prerequisite for application of preclusion rules is that the matter has been fully litigated on the merits. This circuit, in deciding *Silverton*, first considered that an evidentiary hearing had been held in state court proceedings on Silverton's claims. The court, citing *Townsend v. Sain*, 372 U.S. 293 (1963) (overruled on other

grounds by *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719 (1992)) stated:

> The existence of a full and fair hearing on constitutional claims under federal standards is the keystone of the unclimbable wall protecting the finality of a prior state habeas adjudication. In its absence, that wall crumbles.

Silverton at 1346. None of the authority cited by defendants or discovered by this court has altered the premise that before preclusion rules can apply to bar a claim, the party against whom the bar is asserted must have had an opportunity for a full and fair hearing on the merits of the claim.

2. Analysis

This court must determine whether the California courts would give preclusive effect to the state court denial of petitioner's state habeas petition. This court must also consider whether under federal standards plaintiff has been afforded a full and fair opportunity for his claims to be heard.

a. State Law

California habeas corpus is, procedurally speaking, an odd duck. It encompasses more than the fact of custody, and can also be used to test the terms and conditions of confinement. *In re Davis*, 25 Cal. 3d 384, 387, 158 Cal. Rptr. 386 (1979). Moreover, one is not jurisdictionally mandated to commence a petition for state habeas corpus in the lowest state court; one can commence the petition in the appellate court, or even the state supreme court.

Harris v. Superior Court, 500 F.2d at 1124, 1127 (9th Cir. 1974) (discussing state law). California case law is also well established that a superior court (or appellate court) habeas corpus decision can be final *only as to the state*. *In re Crow*, 4 Cal. 3d 613, 621-622, 94 Cal. Rptr. 254, 260 (1971). This is so because a losing petitioner *may not* appeal an adverse lower court habeas decision; only the state may do so. *Id.* at 621 (n.8), 94 Cal. Rptr. at 260 (n.8). A petitioner who loses a lower court habeas decision may, however, commence new petitions on the same subject matter in the Court of Appeal or the Supreme Court. *id.* The California courts have expressly held that principles of res judicata and collateral estoppel do not apply to habeas corpus *petitioners* who file habeas petitions in the lower state courts. *Id.*; *see also In re Clark*, 5 Cal. 4th 750, 767 (n.7), and 773, 21 Cal. Rptr. 2d 520 (n.7) and 523; *In re Richard*, 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 534 (1975); *Younan v. Caruso*, 51 Cal. App. 4th 401, 410, 59 Cal. Rptr. 2d 103 (1996); *In re Fain*, 139 Cal. App. 3d 295, 301, 188 Cal. Rptr. 653 (1983).

As discussed above, since the application of *res judicata*/collateral estoppel in a § 1983 action is dependent on the treatment given to such actions, however denominated, by *state law*, defendants' position herein – that a Court of Appeal postcard denial of a petition for habeas corpus is *res judicata* in a later filed § 1983 action – is untenable.

The court understands that *Silverton* can be read to the contrary, and as authority for the proposition that *res judicata* will apply to any state court habeas decision commenced in a lower state court. However, in *Silverton*, there was no discussion whatsoever of California habeas

corpus law, and the *Silverton* court clearly believed that it was dealing with "final" state court habeas proceedings.[5] In any event, this court is bound, in the ultimate analysis, by United State Supreme Court authority which has directed that state law is to be followed in determining whether *res judicata*/collateral estoppel can be applied in § 1983 actions.

In addition, even if a lower California court habeas decision could stand as a basis for a *res judicata* ruling in the abstract, traditional requirements for application of the doctrine would preclude application in this case.

In California, the preclusive effect of a prior judgment depends upon three factors: (1) whether there is a final judgment on the merits in the earlier proceeding; (2) whether the claims or causes of action involved in both suits were litigated and decided in the first proceeding, or could have been; and (3) whether the parties against whom the principle is invoked were parties to the first adjudication or are in privity with such parties. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

When applying preclusion doctrine, California courts, like the federal courts, have limited its application only to matters which have been fully litigated. *See, e.g.*,

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[5] The factual recitation in *Silverton* is confusing. As detailed above, a losing petitioner in a state habeas corpus action filed in Superior Court or the Court of Appeal has no right of appeal to a higher court from an adverse decision. Yet, in *Silverton*, the petitioner supposedly appealed his Superior Court loss to the appellate courts. This situation is markedly different from the state law outlined above.

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); *DeWeese v. Unick*, 102 Cal. App. 3d 100, 105, 162 Cal. Rptr. 259, 262 (1980). In contexts more similar to this case, California courts have refused to find that summary disposition of cases constitutes a full and fair opportunity to litigate on the merits. For example, in determining whether the summary denial of a habeas corpus petition was a decision on the merits for purposes of the doctrine of law of the case, the California Court of Appeal for the Third District held that "the summary denial of a writ of habeas corpus petition by an appellate court, without the issuance of a writ or order to show cause and the consequent creation of a 'cause' (Cal. Const., Art. VI, § 14) is not a decision which can determine the law of the case." *People v. Pacini*, 120 Cal. App. 3d 877, 174 Cal. Rptr. 820 (1981).[6] After carefully analyzing the unique procedure involved in California state habeas proceedings, the *Pacini* court reasoned that summary denials were not binding as law of the case because "the explanations did not amount to formal opinions and the 'important' right

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[6] The court is aware that the Ninth Circuit has distinguished the *Pacini* opinion. *LaRue v. McCarthy*, 833 F.2d 140, 143, n.2 (9th Cir. 1987) *cert. den.*, 485 U.S. 1012 (1988), citing *Harris v. Superior Court*, 500 F.2d 1124, 1127-28 (9th Cir. 1974) (en banc) *cert. den.*, 420 U.S. 973 (1975). However, as discussed subsequently, the Ninth Circuit opinions which find that California Supreme Court summary or postcard denial without citation to authority constitutes a decision on the merits consider that issue for purposes of determining whether a federal habeas corpus petitioner has exhausted state remedies. *Pacini* was cited with approval by the California Supreme Court in *Kowis v. Howard*, 3 Cal. 4th 888, 895, 838 P.2d 250, 253, 12 Cal. Rptr. 2d 728, 731 (1992).

to present oral argument was not afforded the petitioners." *Pacini*, at 885 (citations omitted). Further, the court was concerned because "[w]ithout an opinion it is not possible to determine what merits were resolved by the . . . decision." *Id.*

Similarly, under California law the doctrine of preclusion may not apply to proceedings in administrative hearings and mandamus unless the matter was fully litigated on the merits. *See, e.g., People v. Sims*, 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321 (1982) (establishing a two part test to determine whether administrative decisions will be given collateral estoppel effect, including whether the parties had an adequate opportunity to litigate under *U.S. v. Utah Const. & Min. Co.*, 384 U.S. 394, 422, (1966)); *Plaine v. McCabe*, 797 F.3d 713 (9th Cir. 1986) (applying California preclusion law to California administrative proceeding and finding preclusive effect because of adequate opportunity to litigate); *McDonough v. Garrison*, 68 Cal. App. 2d 318, 156 P.2d 983 (1945) (refusing to give preclusive effect to summary denial of application for writ of mandate).

In the instant case, the California Court of appeal did request the Attorney General to informally respond to plaintiff's habeas petition. However, no order to show cause was issued. Nor was oral argument held. Instead, the California Court of Appeal issued a "postcard" denial, and, of course, petitioner had no right of appeal to the state supreme court. For the reasons set forth above, the court also finds that this decision cannot have preclusive effect on the instant § 1983 action because there was no full and fair opportunity to litigate the matter. The

court declines to find that plaintiff is barred by the doctrine of res judicata from presenting his § 1983 claims in this forum.

B. Sandin

In light of *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), plaintiff's claim regarding the imposition of the R suffix is cognizable only if a liberty interest is implicated. Plaintiff has a liberty interest in being free of the R suffix classification only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 115 S. Ct. at 2300 (citations omitted). Due process rights do not attach unless a liberty interest is implicated. Loss of general population privileges and benefits, without more, do not constitute the type of "atypical and significant deprivation in which a state might conceivabl[y] create a liberty interest." *See id.* at 2301. Accordingly, the court must determine the consequences of the R suffix.

Attached as defendants' Appendix is a portion of the Department of Corrections Operations Manual. The portion attached includes information regarding the R suffix. Section 62010.4.3.1 provides as follows:

> "R" suffixes applied to inmates are intended to limit their opportunity to escape, or reoffend while in custody. When housed in a Level I facility, Level I inmates with "R" suffixes shall only be housed at:
>
> * California Correctional Institution – I.
>
> *California Men's Colony – West.
>
> *Correctional Training Facility – South.

*California Correctional Center – I.

*Sierra Conservation Center – I.

They shall not be assigned outside of the security perimeter without direct constant supervision.

Defendants also state that a R suffix designation may also restrict the inmate from working around or near female personnel, although they offer no exhibits to support this contention.

In his opposition to defendants' motion, plaintiff does not assert that there are any "official" detriments by way of an "R" suffix other than those described by defendants. Plaintiff asserts that inmates with the R suffix classification are threatened by other inmates. Plaintiff alleges that although his R-suffix classification is supposed to be confidential, "defendants and other departmental personnel commonly provide such information to the general inmate population." Opposition, p. 10. In his affidavit attached to the opposition plaintiff contends that, because of his R suffix classification, he has "on numerous occasions been called upon to protect my own safety because of this information." However, he does not actually describe any specific incident where he was threatened for being a "sex offender." Furthermore, defendants' alleged failure to keep this information confidential raises an Eighth Amendment failure to protect claim rather than a due process claim.

In support of his claim that the "stigma" of being labeled a sex offender creates a liberty interest, plaintiff cites *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997). In *Neal*,

the Ninth Circuit held that the state's labeling of a prisoner as a "sex offender" without hearing and requiring successful completion of treatment program as precondition for parole eligibility *together* created a liberty interest protected by due process. In reaching this conclusion, the Ninth Circuit stated, "[w]e can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender." *Neal*, 131 F.3d at 829. However, the court found that the liberty interest at stake was the stigmatizing consequence of the attachment of the "sex offender" label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion was a precondition for parole eligibility. *Neal*, 131 F.3d at 830.

The instant case is distinguishable from *Neal* in that the only apparent consequences of the "R" suffix designation, other than the stigma, are that Level I inmates may only be housed at certain prisons and that all inmates with R suffixes cannot be assigned outside of the security perimeter without direct supervision.[7] Inmates have no right to be assigned to any particular institution. *See Meachum v. Fano*, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 2538 (1976). Moreover, the restriction on working outside of the security perimeter would, at most, impact an inmate's employment opportunities. Prisoners have no constitutional right to employment. *Baumann v. Arizona Dep't of Corrections*, 754 F.2d 841, 846 (9th Cir. 1985). Pursuant to *Neal*, the stigma of being labeled a sex offender as a result

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[7] Plaintiff is presently housed at California State Prison – Solano. This is not one of the prisons listed above in which Level I inmates with R suffixes must be housed.

of the R suffix, standing alone, does not create a liberty interest.

There are phrasings in *Neal*, which taken by themselves, could be read to indicate that the classification of plaintiff as a sex offender, without more, violates a liberty interest.

> The classification of an inmate as a sex offender is precisely the type of "atypical and significant hardship on the inmate . . . that the Supreme Court held created a protected liberty interests. *Sandin*, 515 U.S. at 482, 115 S. Ct. at 2300.

Neal, 131 F.2d at 829.

Also: "Therefore, we hold that an inmate whom the prison intends to classify as a sex offender is entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense." *Id.* at 831. However, these statements were made in the express context of the mandatory nature of the concomitant treatment program. "The liberty interest at stake in this case is similar in form and scope to the interest at stake in *Vitek*: the stigmatizing consequences of the attachment of the 'sex offender' label *coupled with* the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility . . . " *Id.* at 830 (emphasis added). Thus, it is clear to the undersigned that the Ninth Circuit did not intend that a mere classification of sex offender status, without more, gives rise to a protected liberty interest under *Sandin*. *See Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) (no federal liberty interest in a classification status). If the classification of an inmate gives rise

to no protected interest under the federal Constitution, it is difficult to find that, nevertheless, classification of inmates in prison is an "atypical and significant hardship" under *Sandin*.[8]

Accordingly, for these reasons, the court finds that imposition of the R suffix does not create a liberty interest entitling plaintiff to due process. Defendants' summary judgment motion should be granted and this action be dismissed.[9]

IT IS HEREBY RECOMMENDED that defendants' February 3, 1998, summary judgment motion be granted and this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised

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[8] Also, the court observes that plaintiff has received plenty of due process as of late concerning the "R" suffix classification. At page 12 of the Opposition, plaintiff asserts that his request to have the "R" suffix removed has been acted upon favorably at lower administrative levels after "hearings," and is pending a final administrative decision.

[9] Defendants' motion includes several other arguments. However, the court does not reach these other claims because it concludes that plaintiff has not stated a liberty interest.

that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: September 30, 1998.

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES
MAGISTRATE JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENITO ARENICIA GARCIA, Plaintiff-Appellant, v. JAMES GOMEZ, Director and CALIFORNIA DEPARTMENT OF CORRECTIONS, Defendants, and IVALEE HENRY; T. ZINK, Chief Deputy Warden; D. CUSTARD, Program Administrator; B. POWELL, Correctional Counselor II; J. OSSMAN, Correctional Counselor; J. Rodgers, Correctional and Parole Representative; B. DUBALL, Associate Warden; K. SISTO and R. CASILLAS, Defendants-Appellees.	No. 95-16398 D.C. No. CV-94-00699-LKK-GGH **MEMORANDUM*** (Filed OCT. 2, 1996)

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Chief Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted September 16, 1996**
San Francisco, California

Before: CANBY and FERNANDEZ, Circuit Judges, and KING, District Judge.***

Benito Arenicia Garcia appeals the district court's dismissal of his civil rights action against California State Prison officials. *See* 42 U.S.C. § 1983. He asserts that the officials violated his rights when they improperly gave him and then refused to remove an "R" suffix classification. He also claims that they took away his conduct credits in retaliation against him for raising the "R" suffix issue. Finally, he argues that he should be able to attack his conviction in this action. We affirm in part and reverse in part.

1. We find merit in Garcia's assertion that his claim regarding his "R" classification should not have been dismissed. *See* Fed. R. Civ. P. 12(b)(6). The "R" classification is one which does apply to actual sex offenders and which may apply to inmates who have been "arrested, detained or charged with any of [those sex] offenses." *See* California Department of Corrections Operations Manual § 62010.4.3.1 (1989); *see also* Cal. Code Regs. tit. 15, § 3377.1(b) (1995). The district court granted the motion to dismiss because of the absence of mandatory language in the classification regulations. Unfortunately, just a few

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** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

*** Hon. George H. King, United States District Judge for the Central District of California, sitting by designation.

days after the magistrate judge filed the report and recommendation upon which the district court's action was based, the Supreme Court changed the analysis. *See Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

Instead of inquiring into whether administrative language is mandatory or discretionary, federal courts must ask whether a restraint arising out of the actions of prison officials "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at ___, 115 S. Ct. at 2300; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996). Because the wrong question was asked and answered we cannot uphold the 12(b)(6) dismissal of Garcia's action.

We do have serious doubts that Garcia can show that he has been deprived of a liberty interest. In general, an inmate has no right to be assigned to any particular institution. *See Meachum v. Fano*, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976). Nor has he a right to any particular classification. *See Moody v. Daggett*, 429 U.S. 78, 88 n.9, 97 S. Ct. 274, 279 n.9, 50 L. Ed. 2d 236 (1976). Nor, for that matter, can an inmate even claim the right to be free from administrative segregation or to be housed with the general prison population. *See Sandin*, ___ U.S. at ___, 115 S. Ct. at 2301; *Grayson v. Rison*, 945 F.2d 1064, 1067 (9th Cir. 1991). In fact, a case which appears similar to the one at hand, but which was decided on summary judgment, recently held that prisoners have no liberty interest in being free from sex offender classification. *Neal v. Shimoda*, 905 F. Supp. 813, 817-18 (D. Haw. 1995).

Nevertheless, the case at hand was not decided at summary judgment; it was decided upon a motion to dismiss.[1] That makes a great deal of difference because the record simply cannot demonstrate the full extent of the deprivation to which Garcia has been and will be subjected. Nor can we be sure that the ultimate decision by prison officials was any less arbitrary than those which preceded it. In short, we are unable to say that there can be no set of facts pursuant to which Garcia could prevail. *See Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (U.S. Feb. 26, 1996) (No. 95-1385).

2. Garcia's claim that prison officials retaliated against him when they "took away" his conduct credits does not have merit. It is true that unconstitutional retaliation can take place in the absence of a liberty interest in some prison benefit, for example placement in a particular facility. *See Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). But in that instance the retaliation infringes some other rights, for example First Amendment rights. *Id.*

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[1] The district court did not point out the deficiencies in Garcia's complaint and give him an opportunity to amend. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Nor did it convert the motion into one for summary judgment and give Garcia notice of his obligations if he sought to oppose that motion. *See Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988). Instead, it looked at some documents outside of the pleadings and relied upon those to summarily determine that Garcia could not amend his complaint. We understand the difficulties faced by district courts in dealing with prisoner complaints. However, there are great dangers in adopting hybrid procedures. *See Lucas v. Department of Corrections*, 66 F.3d 245, 248-49 (9th Cir. 1995) (per curiam).

Garcia's difficult is that his criminal background dictates that he has no right whatever to conduct credits. *See* Cal. Penal Code § 2933.5.[2] Regardless of the prison officials' animus, retaliatory or not, they could not and cannot award him conduct credits because state law precludes them from doing so. Whether he did or did not do something to annoy them is outside the point. They cannot be responsible for not awarding him conduct credits precluded by state law.

3. Garcia does not advance his cause with his claim that because his attorney misadvised him regarding conduct credits he should be able to attack his conviction. Even if that claim is correct, he must present it by means of a petition for habeas corpus. *See Heck v. Humphrey*, 512 U.S. 477, ___, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994). A § 1983 action will not lie against these defendants.[3]

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[2] Garcia suggests that under California law only a court can declare that he is not entitled to conduct credits. He is wrong. *See People v. Goodloe*, 37 Cal. App. 4th 485, 490-95, 44 Cal. Rptr. 2d 15, 18-21 (1995).

[3] Similarly, Garcia's passing assertion that California Penal Code § 2933.5 is itself unconstitutional cannot help him. That is merely an attack on the length of his sentence and is not properly brought in this proceeding. *See Wolff v. McDonnell*, 418 U.S. 539, 554-55, 94 S. Ct. 2963, 2973-74, 41 L. Ed. 2d 935 (1974); *Preiser v. Rodriquez*, 411 U.S. 475, 487, 500, 93 S. Ct. 1827, 1835, 1841, 36 L. Ed. 2d 439 (1973); *Sisk v. CSO Branch*, 974 F.2d 116, 117 (9th Cir. 1992); *Young v. Kenny*, 907 F.2d 874, 875-76 (9th Cir. 1989), *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1090, 112 L. Ed. 2d 1194 (1991); *Toussaint v. McCarthy*, 801 F.2d 1080, 1096 n.14 (9th Cir. 1986); *cert. denied*, 481 U.S. 1069, 107 S. Ct. 2462, 95 L. Ed. 2d 871 (1987).

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENITO ARENICIA GARCIA,

Plaintiff,

vs.

IVALEE HENRY, et al.,

Defendants.

_____/

No. CIV S-04-0699 LKK GGH P

ORDER

(Filed JUL. 14, 1995)

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On June 15, 1995, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty (20) days. The magistrate judge recommended that the motion to dismiss filed on behalf of defendants Henry, Custard, Powell, Ossman, Rodgers, Diball, Sisto and Casillas be granted. The magistrate judge observed that the only defendant not joining in the motion was defendant Zink. On July 5, 1995, plaintiff filed objections to the findings and recommendations.

On May 19, 1995, defendant Zink filed a motion to dismiss on the same grounds as those raised in the motion filed on behalf of the other defendants. On May 31, 1995, the magistrate judge granted defendant Zink's

request for leave to file a late response to plaintiff's complaint.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Because the findings and recommendations address the issues raised in defendant Zink's motion to dismiss, this court will grant defendant Zink's motion to dismiss for the reasons stated in the findings and recommendations.

On July 7, 1995, plaintiff filed a motion requesting that this action be stayed until he exhausts his state court remedies regarding his claim of denial of time credits. In the findings and recommendations, the magistrate judge found that plaintiff had failed to link any of the named defendants with this claim. The magistrate judge also found that the ruling on the merits obviates the need for a stay of this action pending exhaustion. *See* June 15, 1995, findings and recommendations, page 12 fn.3. For these reasons, plaintiff's July 7, 1995, motion to stay is denied.

Accordingly, IT IS HEREBY ORDERED THAT:

1. The Findings and Recommendations filed June 12, 1995, are adopted in full;

2. The March 9, 1995, motion to dismiss filed on behalf of defendants Henry, Custard, Powell, Ossman, Rogers, Dieball, Sisto and Casillas is granted;

3. For the reasons stated in the June 12, 1995, findings and recommendations, the motion to dismiss filed May 19, 1995, on behalf of defendant Zink is granted;

4. Plaintiff's July 7, 1995, motion to stay is denied;

5. This action is dismissed.

DATED: 7/14/95

/s/ Lawrence K. Karlton
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BENITO ARENICIA GARCIA,

Plaintiff,

vs.

IVALEE HENRY, et al.,

Defendants.

_____/

No. CIV S-94-0699 LKK GGH P

FINDINGS AND RECOMMENDATIONS

(Filed June 15, 1995)

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. §1983. Pending before the court is a motion to dismiss filed by defendants Henry, Custard, Powell, Ossmann, Rodgers, Dieball, Sisto and Casillas.[1]

Plaintiff has attached numerous exhibits to his opposition to the motion to dismiss. Although the court has the option of transforming the motion to dismiss, which is adjudicated only on the pleadings, to a motion for summary judgment in which reference can be made to exhibits, the court need not make such a transformation. Even if the exhibits were to be considered as part of the complaint, defendants remain entitled to judgment as a matter of law. However, in the rendition of the facts, the

[1] Defendant Ossmann was erroneously sued as Ossman. Defendant Dieball was erroneously sued as Duball. The only defendant not joining in the motion to dismiss is defendant Zink.

court will refer to the exhibits for the purpose of demonstrating that dismissing with leave to amend would be futile.

Legal Standard for Motion to Dismiss

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen,* 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969). Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984), *citing Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Palmer v. Roosevelt Lake Log Owners Ass'n,* 651 F.2d 1289, 1294 (9th Cir. 1981).

Plaintiff's Allegations

This action is proceeding on plaintiff's amended complaint filed November 4, 1994. Named as defendants are Ivalee Henry, T. Zink, D. Custard, B. Powell, J. Ossmann, J. Rodgers, R. Dieball, K. Sisto and R. Casillas.

Plaintiff alleges that in 1976 he was arrested for violations of California Penal Code sections 261, 286 and 288A (sexual offenses). Plaintiff later underwent a polygraph examination the results of which, apparently, did not link

him to the crime. On February 10, 1977, the charges were dismissed and the court advised him that there had been a mistake.

In 1991, regarding an unrelated charge (voluntary manslaughter), plaintiff was incarcerated at the California Institution for Men (CIM). At his initial classification, the Classification Committee acted to "impose" an "R" suffix onto plaintiff's identification number. The "R" suffix is added to the numbers of inmates who have committed sexual offenses or who have had "significant arrests" for sexual offenses. The result of this suffix is that the inmate's visiting and work opportunities are limited.

Plaintiff was later transferred to the California State Prison at Ione. Plaintiff requested that the "R" suffix be removed because he had never been convicted of a sexual offense. Defendant Henry denied plaintiff's second level appeal. Plaintiff appeared before the Unit Classification Committee of which defendants Powell and Custard were members. The committee denied plaintiff's request to remove the suffix. Later, the central office of the California Department of Corrections (CDC) granted plaintiff a review of this matter. On October 5, 1992, the Institutional Classification Committee, whose members included defendants Zink and Rodgers, denied plaintiff's request.

Plaintiff later filed a motion in the Alameda Superior Court for a finding of factual innocence pursuant to Cal. Penal Code §851.8(c). This motion was returned to plaintiff unfiled. Plaintiff then sought habeas corpus relief with the Alameda Superior Court. This request was denied. Plaintiff then filed a motion with the California

Court of Appeals. The appellate court ordered the Attorney General to respond to plaintiff's petition. Plaintiff alleges that the Attorney General discovered that plaintiff was eligible for the "application of P.C. 2933.5"[2] and faxed this information to the California Medical Facility where plaintiff had been transferred. Plaintiff alleges that §2933.5 is unconstitutional and should not have been applied to him.

At CMF, plaintiff filed an administrative appeal requesting that the "R" suffix be removed. This request was denied by defendant Dieball. Plaintiff alleges that as a result of the application of a §2933.5, unknown prison officials took away all of plaintiff's goodtime and work credits without a hearing. Plaintiff's release date prior to application of this section was November 16, 1996; plaintiff's release date is now December 13, 2001. Plaintiff alleges that the Attorney General imposed §2933.5 on plaintiff in retaliation for his efforts to have the "R" suffix removed.

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[2] Cal. Penal Code §. 2933.5 denies good time credits to persons convicted of certain crimes who have two or more prior convictions. Plaintiff's underlying conviction for which he is presently serving time is voluntary manslaughter (although some of the exhibits indicate involuntary manslaughter). Section 2933.5(2)(B) (voluntary manslaughter with priors) would preclude plaintiff from receiving credits if he has two qualifying prior convictions. The exhibits attached to plaintiff's opposition to the motion to dismiss indicate that plaintiff cannot receive time credits, not because of the imposition of a "R" suffix, but because of his present commitment offense and his prior criminal history.

In May 1994 the Unit Classification Committee again reviewed plaintiff's request for removal of the suffix. At that time, defendants Casillas and Sisto denied plaintiff's request.

Plaintiff has attached numerous exhibits to his well documented opposition to the motion to dismiss. As noted above, the court did not need to transform the motion to dismiss into one for summary judgment since the exhibits do not change the legal rule that plaintiff has failed to state a federal claim concerning his "R" suffix or his time credit status under Cal. Penal Code §2933.5. Therefore, the exhibits need not be recognized in the court's ruling, but the exhibits are instructive to the court's ultimate recommendation that the action be dismissed without leave to amend. Although the exhibits reveal that the initial classification decision to place an "R" suffix on plaintiff's record was based on a patently erroneous impression, the administrative appeals process ultimately discarded the initial "case was not closed" theory, and finally ruled utilizing a viable theory which looked to the merits.

The exhibits note that plaintiff was arrested in 1976 on multiple charges including three counts of rape (Cal. Penal Code §261), three counts of oral copulation (Cal. Penal Code §288(a), and three counts of sodomy (Cal. Penal Code §286). The Classification committee wrote to Alameda County seeking information concerning the charges' disposition. Alameda County returned the information that had been placed in the file at the time the charges were dismissed *in 1976:*

> Discharged – Insufficient Evidence
>
> After proceedings have been initiated, the D.A. is not prepared to proceed. Defendant is discharged pending possible re-filing.

Plaintiff's Exhibit A (second page)

The classification committee took this information and rendered its decision:

> [A] letter received from Alameda Municipal Court indicated that the District Attorney was not prepared to proceed with charges, however noting that the "defendant is discharged pending possible refiling". Based on this information, Committee feels this case has not been closed and could be reopened at any time. Therefore, based on the above information, Committee elects to retain the "R" suffix on Subject's custody.

Plaintiff's Exhibit B.

Plaintiff's various initial administrative appeals dispositions basically reiterated the rationale of the classification committee, *see*, e.g., Appeal Disposition of Ivalee Henry, Plaintiff's Exhibit C, i.e., the case was still "open." These decisions were patently incorrect in that the California statute of limitations had expired and California was jurisdictionally barred from proceeding on these claims. Cal. Penal Code §800 (six year statute of limitations). *See, People v. McGee*, 1 Cal. 2d 611 (1934).

However, the Director Level Decision dated September 18, 1992, Plaintiff's Exhibit D, p. 4, recognized the fact that the decision of whether to prosecute plaintiff for the 1976 crimes was not subject to reopening. The matter was

remanded to the classification committee for a further review of the possibility of removal of the "R" suffix "based on the absence of police reports and the lapse of time."

On October 5, 1992, plaintiff's "R" suffix was reviewed, and the decision to keep the suffix was reaffirmed. Plaintiff's Exhibit E. The problem with this decision is that it was based solely on the fact that a previous committee had decided to impose the suffix and there was no "new" evidence. The classification committee did not appear to have taken into account the Director Level Decision. If this were the final administrative decision on the matter, this court would be left with the impression that the prison officials had acted in a totally arbitrary manner. However, a later review committee substantially added to the basis for decision:

> The ICC also notes Municipal Court documentation from Alameda County, dated 5/2/94, on page 2, indicates that "even though the D.A. did not prosecute, the arrest was not groundless nor was the defendant factually innocent."

Plaintiff's Exhibit R at p.6

Plaintiff appealed again to the Director Level; his appeal was denied based on the quoted sentence. Plaintiff's Exhibit R, Decision dated November 18, 1994.

Plaintiff seeks monetary damages as well as declaratory and injunctive relief.

Defendants' Motion to Dismiss

Defendants make three arguments in support of their motion: qualified immunity, no right to an effective

appeals process and *Young v. Kenny* exhaustion. However, the court will first address a sub-issue of their claim that they are entitled to qualified immunity for declining to remove the "R" suffix.

Defendants argue that plaintiff is incorrect in his assertion that an "R" suffix classification requires a conviction for sexual offenses. According to defendants, an "R" suffix is used to designate inmates who have a history of specific sexual offenses and may be applied to inmates with a record of arrest or detention for sexual offenses. Attached to defendants' motion as Appendix A is a copy of Cal. Code Regs. tit. 15, §3377.1. The court may take judicial notice of this regulation on a motion to dismiss. Section 3371.1(b)(1) states as follows:

> (b) An "R" suffix shall be affixed by a classification com[m]ittee to the inmate's custody designation to alert staff of inmates who have a history of specific sexual offenses.
>
> (1) the "R" suffix shall be designated for any inmate who was convicted of, or whose commitment offense includes an act equivalent to any of the following offenses:

§3371.1(b)(2) provides,

> (2) Within six months upon reception of an inmate with a record of arrest or detention for any offenses listed in section 3377.1(b)(1), a classification committee shall determine the need for an "R" suffix to the inmate's custody designation. The committee shall consider the arrest reports and district attorney's comments related to each such arrest.

Before examining defendants' argument that they are entitled to qualified immunity, the court will first determine whether plaintiff has a constitutional right to be properly classified. Prisoners have no constitutional right to a particular classification. *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987). The Due Process Clause itself does not create a liberty interest in a particular classification. *See Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976). Nonetheless, state law can create a liberty interest where federal law initially does not. However, prison regulations do not create a protected liberty interest unless they establish substantive predicates and use explicitly mandatory language to limit prison officials' discretion. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

Section 3371.1(b)(2) allows for prison officials to exercise their discretion in determining the appropriateness of the "R" suffix designation where an inmate has been arrested or detained for specified offenses. However, this section and the other relevant sections contained under §3371 do not contain substantive predicates or explicitly mandatory language limiting prison officials' discretion as to when to impose an "R" suffix. Therefore, plaintiff has no state-created due process right regarding the "R" classification.

Because the court finds that plaintiff has no due process right regarding the addition of the "R" suffix to his identification number, the issue of whether or not defendants are entitled to qualified immunity is not appropriately decided. Because the gravamen of plaintiff's complaint against all defendants is that they

improperly applied the "R" suffix, the court will recommend that this action be dismissed against all defendants.

Defendants have also argued that the complaint should be dismissed against defendants Ossman and Henry because plaintiff has only alleged that they improperly processed his administrative appeal. It is true that the non-existence of, or the failure of prison officials to properly implement, an administrative appeals process within the prison system does not raise constitutional concerns. This court agrees with two recent circuit court decisions on the subject. *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993); *Flick v. Alba*, 932 F.2d 728 (8th Cir. 1991). *See also, Azeez v. DeRobertis*, 568 F.Supp. 8, 10 (N.D.Ill. 1982) ("[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment."); *Spencer v. Moore*, 638 F.Supp. 315, 316 (E.D.Mo. 1986). Specifically, a failure to process a grievance does not state a constitutional violation. *Buckley, supra.*

State procedures can create a liberty interest, but it is not every regulatory procedure, even mandatory ones, that give rise to a liberty interest. To create a liberty interest, a state regulation must contain both (1) mandatory language, such as "shall," and (2) specific substantive predicates that govern the action rather than mere administrative discretion. *Dix v. County of Shasta*, 963 F.2d 1296 (9th Cir. 1992); *Mendoza v. Blodgett*, 960 F.2d 1425 (9th Cir. 1992). The court has reviewed the inmate appeals procedures set forth in Title 15 of the California Administrative Regulations §§3084-3084.7. Assuming that the

appeals process is a "mandatory" procedural process, a fact which is not at all clear from a review of the regulations, the regulations certainly do not contain any substantive predicates such as – if an appeal is not processed, it will be deemed granted.

Therefore, if plaintiff is in fact alleging that defendants improperly processed and denied his appeal, these claims should be dismissed as well.

Plaintiff has also alleged that §2933.5 was applied by unknown defendants and the Office of the Attorney General in retaliation for plaintiff's complaints regarding the "R" suffix. However, none of the defendants named in the complaint are linked with this action.

The Civil Rights Act under which this action was filed provides:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. §1983.

The statute plainly requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has held that "[a] person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates

in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

Moreover, supervisory personnel are generally not liable under section 1983 for the actions of their employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a supervisorial position, the causal link between him and the claimed constitutional violation must be specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient to withstand a motion to dismiss. *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

Because plaintiff has failed to link any named defendants with his claim regarding the improper application of §2933.5, the court recommends that this claim be dismissed.[3]

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[3] The court will not address defendant's *Young v. Kenny* exhaustion arguments regarding the denial of time credits. It is apparently quite clear from plaintiff's exhibits that he has attempted to exhaust his remedies through the California Supreme Court. In any event, the ruling on the merits obviates the need for a stay of this action pending exhaustion.

The Dismissal Should Be Without Leave To Amend

Because plaintiff has not been deprived of a liberty interest with the imposition of his "R" suffix, plaintiff is not entitled to due process with respect to its imposition. Moreover, although the factual basis for the classification committee's decision remains scant, it appears that the 1994 classification committee finally abided by the words of the regulation and based its decision on comments of the district attorney in 1976 instead of an incorrect perception of the law. Secondly, as noted above, even if the administrative appellate decisions were erroneous, especially the initial decisions, plaintiff will never be found entitled to have had a "correct" or timely prison appeals decision. Finally, it is clear from plaintiff's own exhibits, that even if he were to ascertain the identities of those persons connected with the belated decision to deny plaintiff time credits pursuant to Cal. Penal Code §2933.5, that he should have been subject to that code section from the commencement of his present incarceration. Plaintiff's Exhibits M and S.[4]

Accordingly, IT IS HEREBY RECOMMENDED that

1. Defendants' motion to dismiss be granted; and

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[4] The court notes that plaintiff alleges in passing that he was not advised at the time he entered his plea to the voluntary manslaughter charge that he would be subject to Cal. Penal Code § 2933.5. If plaintiff desires to file a habeas action on this matter, he should re-file utilizing a habeas form. The court in this action does not intend to preclude such a filing, and the court does not give any opinion on the merits of such a habeas claim.

2. Defendants Henry, Custard, Powell, Ossmann, Rodgers, Dieball, Sisto and Casillas be dismissed from this action.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. §636(b)(1). Within twenty (20) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: June 13, 1995.

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES
MAGISTRATE JUDGE